TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~406.~~ 2843

THE UNITED STATES, APPELLANTS,

vs.

JOHN H. KIMBALL AND WILLIAM G. BARROWS.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 18, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 466.

THE UNITED STATES, APPELLANTS,

vs.

JOHN H. KIMBALL AND WILLIAM G. BARROWS.

APPEAL FROM THE COURT OF CLAIMS.

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1 *Petition.—Filed Jan'y 6, 1868.*

United States Court of Claims, December term, 1867.

JOHN H. KIMBALL AND WILLIAM G. BARROWS
vs.
THE UNITED STATES.

To the honorable the judges of the Court of Claims:

The petition of John H. Kimball, of Bath, in the county of Sagadahoc, and William G. Barrows, of Brunswick, in the county of Cumberland, in the State of Maine, respectfully represents—

That on the 18th day of April, 1865, and for the space of one year thereafter, your petitioners were the sole owners of the bark Annie Kimball.

That on the said 18th day of April, 1865, the United States military authorities, represented by Captain Henry Bowman, assistant quartermaster U. S. A., chartered the said bark to transport a cargo of coal from Philadelphia to Port Royal, in the State of South Carolina; the terms and conditions of which said service are set forth in the exhibit marked "A," hereto annexed, and which said exhibit your petitioners pray may be made and considered as a part of this their petition.

That immediately after the execution of the bill of lading or contract marked Exhibit "A," the cargo of coal mentioned therein was received on board said bark and transported to Port Royal without accident or delay, arriving at said port on or about the 4th day of May, 1865.

That immediately after the arrival of said bark at Port Royal as aforesaid, the master of said bark offered to deliver said cargo to the United States assistant quartermaster in charge at said port, but the said quartermaster refused to receive the same, and peremptorily ordered the master to report with said vessel and cargo at Key West, in the State of Florida, without delay.

That said master protested against moving said vessel beyond the port of Port Royal, whereupon a tug-boat in the service and employ of the U. S. military authorities, by direction of the U. S. assistant quartermaster in charge, forcibly undertook to tow the "Annie Kimball" out of the harbor and over the bar at Port Royal.

2 That the tide was on the ebb and a fresh breeze blowing at the time said tug-boat thus undertook to tow the "Annie Kimball" to sea; and the water on the bar being low, and said vessel heavily laden, she struck the bar violently several times, which caused her to leak and become disabled, and she finally drifted ashore; all of which occurred without fault or negligence on the part of the petitioners, or of the officers or crew of said vessel.

That by reason of the striking and beaching of said vessel as aforesaid she became and was badly damaged, and your petitioners were obliged to expend the sum of seven thousand and five dollars and forty-two cents upon her in repairs.

That by reason of the premises, and of the second section of the act of Congress approved March 3d, 1849, chapter cxxvi, and the act of March 3d, 1863, amendatory thereof, your petitioners became entitled to receive from the United States the sum so expended for repairs.

That your petitioners have applied to the proper department of the United States for payment of the sum so due, but payment of the same, or any part thereof, was refused by said department.

That your petitioners have always borne true allegiance to the gov-

ernment of the United States, are citizens thereof, and have never voluntarily aided, abetted, or given encouragement to the rebellion against said government.

Your petitioners therefor claim that there is due from the United States the sum of seven thousand and five dollars and forty-two cents, and for that amount they respectfully pray judgment.

CHIPMAN & HOSMER,
Att'ys for Petitioners.

STATE OF MAINE, *County of Cumberland, ss:*

John H. Kimball and William G. Barrows, being duly sworn, say that they are the petitioners named in the foregoing petition, and that no assignment or transfer of the claim therein mentioned, or any part thereof, or any interest therein, has ever been made to any person whomsoever; that they are justly entitled to receive from the United States the sum of money claimed in said petition, after deducting all just credits and offsets; and that they verily believe the facts as stated in said petition to be true.

JOHN H. KIMBALL.
WILLIAM G. BARROWS.

Sworn and subscribed before me this sixteenth day of December, A. D. 1867.

C. C. HUMPHREYS,
Justice of the Peace.

EXHIBIT "A."

PHILADELPHIA, *April 18th*, 1865.

Shipped by Capt. Henry Bowman, A. Q. M. U. S. A., in good order, on board the barque Annie Kimball, of Bath, Me., whereof the undersigned is master for this voyage, now lying in the port of Philadelphia, and bound for Port Royal, S. C., (1061) ten hundred and sixty-one tons (2240 lbs. each) of

ANTHRACITE STEAMER COAL,

all under deck, which I promise to deliver in the like good order at the port of Port Royal, S. C., (the damages of the seas only excepted,) unto Lieut. S. S. Gregory, act'g ass't quartermaster, or to his assigns; freight for the same payable by the U. S. quartermaster at Philadelphia, to the order of John H. Kimball, at the rate of six $\frac{25}{100}$ dollars per ton, and demurrage one hundred dollars per day, allowing twenty-one (21) days for discharging.

In witness whereof the master of the said vessel hath affirmed to six bills of lading, all of this tenor and date; one of which being accomplished, the others to stand void.

(Signed) D. M. HUMPHREYS.

If on the arrival of this vessel at the port of destination, the consignee should order her to another place to discharge, such order in all cases to be in writing on the bill of lading.
Freight and demurrage payable only on certificate of quartermaster that the cargo has been received in good order.

Endorsed on the face as follows:

The United States government assumes the war risk on the passage of this vessel out to Port Royal, S. C., and till discharged, the valuation being thirty-six thousand dollars, ($36,000.)

(Signed) HENRY BOWMAN,
Capt. & Ass't Quartermaster.

Endorsed on the back as follows:

Arrived at Hilton Head, S. C., May 4th, 1865, at 3 o'clock p. m.
(Signed) JOHN L. KELLY,
Capt. & A. Q. M.

Discharged at Hilton Head, S. C., June 24th, 1865, at 11 o'clock p. m. Cargo received in good order as per within bill of lading. The detention of the vessel was owing to no fault of the master or crew.
(Signed) JOHN L. KELLY,
Cap't & Ass't Quartermaster.

4 In the United States Court of Claims, December term, A. D. 1867.

JOHN H. KIMBALL AND WILLIAM G. BARROWS
vs.
THE UNITED STATES. } No. 3045.

And the said defendants, by their solicitor, come and make answer to the petition of the claimant on file herein; and, not confessing the same, or any part thereof, do hereby most expressly deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of said petition as sets forth and avers that the United States are indebted to said claimant in the sum of seven thousand and five dollars and forty-two cents, the defendants say that they are not indebted to said claimant in said sum of money, nor any part thereof.

And as to so much of said petition as avers that the said claimants have at all times borne true faith and allegiance to the government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against said government, the said defendants deny the truth of said allegation, and call for proof thereof.

JOHN J. WEED,
Ass't Assistant *Attorney General.*

Filed May 12, 1868.

(Indorsed:) No. . vs. The United States. Traverse. T. H. Talbot, Assistant Attorney General.

5 *Amended petition.—Filed Jan'y* 10, 1870.

United States Court of Claims, December term, 1868.

JOHN H. KIMBALL ET AL.
vs.
THE UNITED STATES. } No. 3045.

To the honorable the judges of the Court of Claims:

Your petitioners, John H. Kimball and William G. Barrows, citizens and residents of the State of Maine, respectfully represent that they were, on the 18th day of April, A. D. 1865, the owners of the bark called the Annie Kimball; that on said day the said vessel entered upon the service of the United States under and by virtue of a regularly executed bill of lading, as set forth in the original petition filed in this cause.

Your petitioners further show that, in addition to the amount claimed in said original petition for the expenses arising from the repairs therein

mentioned, the United States became liable to your petitioners for demurrage at the rate of one hundred dollars per day for each and every day lost by reason of the action of the United States, whereby the petitioners should be or were deprived of the use of said bark.

Your petitioners aver that, in consequence of the accident to said bark, as set forth in the original petition, the services of said bark were lost to your petitioners for the space of fifty-six days, and that the United States are liable to your petitioners, by reason thereof, for the sum
6 of fifty-six hundred dollars, and for that amount they ask judgment.

Your petitioners further aver that they have at all times borne true allegiance to the government of the United States, and have not in any way voluntarily given aid or comfort to the rebellion against said government; that they have made application to the proper department for payment of the claim herein stated, but without success.

Your petitioners, therefore, by reason of the premises, ask judgment for the whole amount herein and in said original petition claimed, to wit, twelve thousand six hundred and five dollars and forty-two cents.

CHIPMAN, HOSMER & CO.,
Solicitors for Petitioners.

STATE OF MAINE, *County of Sagadahoc, ss:*

Personally came before me, a justice of the peace in and for said county and State, John H. Kimball, who, being duly sworn, says that he is one of the petitioners in the foregoing petition; that no assignment of the claim therein stated has been made, except as in said petition stated; that the amount claimed is due to the petitioners after allowing all just offsets and credits; and that the matters and things in said petition stated are true.

JOHN H. KIMBALL.

Subscribed and sworn to before me this twenty-sixth day of August, A. D. 1869.

GEO. FISHER,
Justice of the Peace.

7 *Special plea for defendants.—Filed Jan'y* 20, 1870.

In the Court of Claims of the United States.

vs.
THE UNITED STATES. } No. 3045.

And the said defendants, by their Attorney General, now come, and, by leave of court, (as expressed in Rule IX,) say that the said claimants ought not further to maintain said action upon this amended petition, because—

1. While the claim presented in said amended petition is such as is ordinarily settled in an executive department, the amended petition does not set forth the decision thereon of the proper department of the government to which application was made for the payment of the claim. (Rule II.)

2. The petition does not set forth a full statement of the action, on the

claim therein presented, by a department of the government, as required by section 1 of the act of February 4, 1855.

3. The evidence in the case does not show that any such application has ever been made to any department of the government, whether with or without success, or any action whatever thereon, without which action this court has no lawful jurisdiction in this case.

And the said defendants pray judgment, &c.

THOMAS H. TALBOT,
Assistant Attorney General.

8 *Amended petition.—Allowed May* 9, 1870.

In the United States Court of Claims.

JOHN H. KIMBALL AND WILLIAM G. BARROWS
vs.
THE UNITED STATES. } 3045.

To the honorable the judges of the Court of Claims:

Your petitioners, John H. Kimball and William G. Barrows, respectfully represent that, in the original petition filed in the above-entitled cause, they claimed from the United States the sum of seven thousand and five dollars and forty-two cents as the cost of repairs to the bark Annie Kimball, whereas the real amount should have been stated at seven thousand six hundred and four dollars and sixty-one cents, which last amount your petitioners aver was the actual sum necessarily expended in said repairs.

Your petitioners, therefore, leave of court being first granted, hereby amend the said original petition so as to conform to the facts in the case, and pray that judgment be entered for petitioners in accordance herewith.

JOHN H. KIMBALL.
WILLIAM G. BARROWS.

STATE OF MAINE, *Cumberland, ss:*

Subscribed and sworn before me this 13th day of May, A. D. 1870.

C. C. HUMPHREYS,
Justice of the Peace.

9 In the Court of Claims.

JOHN H. KIMBALL AND WILLIAM G. BARROWS
vs.
THE UNITED STATES. } 3045.

And now, to wit, 9th of May, A. D. 1870, the court, upon due consideration of the premises, find in favor of the claimants, and do order, adjudge, and decree that the said John H. Kimball and William G. Barrows, claimants, have and recover of and from the United States the sum of twelve thousand nine hundred and four dollars and forty-one cents, ($12,904 41.)

By the court.

A true copy of record.

10 In the Court of Claims.

JOHN H. KIMBALL AND W'M G. BARROW
vs.
THE UNITED STATES. } No. 3045.

The defendants, by their Att'y General, come and take an appeal from the decision of this court in this case, rendered on the 9th May, 1870.

THOMAS H. TALBOT,
Ass't Att'y General.

Washington, D. C.—Filed May 16, 1870.

JOHN H. KIMBALL AND WILLIAM G. BARROWS
vs.
THE UNITED STATES. } 3045.

On the application presented by the Assistant Attorney General on the 16th of May, 1870, for an allowance of an appeal in this case, it was—

Ordered, that the appeal be allowed as prayed for.

By the court.

11 KIMBALL'S CASE.

Finding of facts in the Court of Claims.

This case coming on to be heard at the December term, 1869, the court makes and determines the following findings of fact and conclusions of law.

I. The claimants and the defendants, on the 18th April, 1865, at Philadelphia, entered into the contract declared upon and set forth in the petition.

II. The marginal note affixed to such contract in the words, "If, on the arrival of this vessel at the port of destination, the consignee should order her to another place to discharge, such order in all cases to be in writing on the bill of lading," was a printed direction placed there by the Quartermaster's Department, intended for the convenience of
12 the department, and as a direction to the officers thereof.

III. The bark Annie Kimball arrived at Port Royal with the freight specified in the bill of lading on the 4th May, 1865, and immediately tendered the freight to the consignee, the defendants' quartermaster. The quartermaster, on the 6th May, refused to receive the same, and ordered the master of the bark to proceed with it to Key West, and report to the quartermaster at that port, which additional service the master of the Annie Kimball refused to perform, and notified the quartermaster that the owners would hold the defendants liable for all damages if such service was enforced. On the 8th May the master of the Annie Kimball was compelled to undertake the additional voyage, and was notified by the quartermaster that in case of refusal he would be taken from the vessel and another master be substituted
13 and sent in command of the vessel. The master then protested at being compelled to sail at the time specified by the quartermaster for the reason that it was not safe, as the tide had ebbed about two hours, and there would not be water enough on the bar to take the vessel safely over. The delay requested was refused. The vessel was

taken in tow by a government tug. She struck violently on the bar off Port Royal by reason of the low water, it being near the ebb, and sprang a leak. Being severely injured, she was towed back and beached to prevent her from foundering.

IV. After the injury to the vessel, she was detained by the defendants' delay in discharging her freight at Port Royal until the 24th June, 1865, the detention being owing to no fault of the master or crew.

14 V. The vessel was then further detained at Port Royal by her injuries received as aforesaid, and by the necessity of having a tow and steam-pump in her disabled condition from and including the 25th June until the 11th July. She was then towed by the defendants to Boston, which port she reached on the 18th July, 1865, when her crew was discharged. The damages suffered by the claimants for the loss of their vessel's service and her expenses was the sum of $100 per day, making the sum of $5,300.

VI. The claimants paid for the repairs of the bark at Boston the sum of $7,604 41, and this amount was expended strictly in making good the vessel's injuries.

VII. The defendants have paid to the claimants the amount due under and by the terms of the contract for the freight, but they have refused to pay the demurrage up to the 24th June, caused by

15 their delay in discharging the cargo, and the further demurrage caused by their impressment of the vessel up to the 18th July, 1865, when she arrived at Boston, and they have also refused to pay the said sum of $7,604 41 paid and expended by the claimants in the necessary repairs of the vessel.

And upon these facts the court decides, as conclusions of law—

I. That the bill of lading on which the action is brought constituted a valid contract of affreightment for the transportation of goods and merchandise from Philadelphia to Port Royal, and that the marginal note thereon, expressing no consideration for further services, imposed no obligation upon the owners to transport the goods to any other port, except with their consent, and upon a rate to be agreed upon.

16 II. That for the demurrage caused by the defendants in not discharging their freight within twenty-one days after the vessel's arrival at Port Royal, that is to say, by the 25th May, the claimants should recover demurrage until the freight was discharged on the 24th June, at the rate agreed upon in the bill of lading, to wit, $100 per day.

III. That the enforced service of the vessel, while remaining in the possession of her master and crew, set forth in the third finding, was not an appropriation of the claimants' property by the army of the United States within the meaning of the act 4th July, 1864, (13 Stat. L., p. 381,) but that it was an impressment of their vessel and crew's service within the meaning of the acts 3rd March, 1849, and 3rd March, 1863, (9 Stat. L., p. 414; id., p. 736,) and of the joint resolution 23rd December,

17 1869, and that the claimants are entitled to recover the value of their vessel's services and expenses from the 25th June to the 18th July, 1865, and their costs and expenditures in repairing, making whole her injuries, to wit, the sum of $12,904 41.

UNITED STATES VS. KIMBALL AND BARROWS.

KIMBALL'S CASE.

Additional facts.

And the Court of Claims, at the request of the defendants, certifies their further conclusions and rulings of law as occuring in the course of the trial:

1. There was no express evidence as to the intention of the parties concerning the printed note or endorsement upon the bill of lading as set forth in the second finding of fact. But it appeared that such printed endorsement was placed on bills of lading by the defend-
18 ants' officers in the Quartermaster's Department, and did not form a part of the body of the instrument, as did certain other formal clauses and conditions, and the court held that these facts constituted sufficient evidence to uphold the ultimate fact set forth in the second finding.

2. It appeared on the trial that the master of the Annie Kimball, on being ordered to proceed to sea with his vessel, as set forth in the third finding, had addressed a written communication to the quartermaster in his official capacity, and referring to his official action in the premises, wherein the master said:

"PORT ROYAL, S. C.,
"*May 6th*, 1865.

"Capt. J. L. KELLY, A. Q. M.,
"*Hilton Head, S. C.:*

"The undersigned, master of the bark 'Annie Kimball,' of Bath, laying in this harbor, has received orders of this date to proceed
19 to Key West, Florida, and there discharge the cargo now on board. As the bark was freighted, as per bill of lading, dated April 18th, 1865, to proceed from Philadelphia with her cargo of 1,061 tons of coal to this port, and having safely arrived here, I consider the vessel's and owner's part of the contract as fulfilled, and therefore, in their behalf, as well as my own as master of said bark, hereby protest against proceeding to said port of Key West, as ordered by you, holding you responsible for all loss, damages, and expenses that may occur or be sustained in the premises.

"D. M. HUMPHREYS,
"*Master of bark 'Annie Kimball.'*"

And the court held that this was sufficient evidence of notice to the defendants that the owners would hold them liable, as set forth in the third finding.

20 3rd. It appeared on the trial that the claimants had presented the bill of lading to the proper officers of the Treasury Department, with proofs of the various facts set forth in the findings, and with a demand specifically stated for the payment of their expenses in making good the vessel's injuries. The officers of the department refused to allow any amount whatever to the claimants, except for the freight of the cargo. And upon these facts the court held that they constituted sufficient evidence to sustain the ultimate fact set forth in the seventh finding, that the defendants have refused to pay the demurrage claimed.

Allowed.

C. C. N.

21 In the Court of Claims.

JOHN H. KIMBALL AND W'M G. BARROWS
vs.
THE UNITED STATES. } No. 3045.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the Attorney General of the United States for the allowance of an appeal, as filed in the clerk's office May 16, 1870, and of the order of the Court of Claims allowing the same; of the findings of fact, and the conclusions of law thereon, upon which the said court founded its judgment.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this sixteenth day of July, A. D. 1870.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 466. The United States, appellants, vs. John H. Kimball and William G. Barrows. Court of Claims. Filed 18th July, 1870.

REC. 466—2

In the Supreme Court of the United States.

DECEMBER TERM, 1870.

THE UNITED STATES, *Appellants*,
vs.
JOHN H. KIMBALL AND OTHERS. } No. 234.

Appeal from the Court of Claims.

BRIEF FOR THE UNITED STATES.

STATEMENT.

On the 18th of April, 1865, the United States shipped a cargo of coal from Philadelphia to Port Royal, under a bill of lading, of which the following is a copy:

"PHILADELPHIA, *April* 18, 1865.

"Shipped by Capt. Henry Bowman, A. Q. M., U. S. A., in good order, on board the barque Annie Kimball, of Bath, Me., whereof the undersigned is master for this voyage, now lying in the port of Philadelphia, and bound for Port Royal, S. C., (1061) ten hundred and sixty-one tons (2240 lbs. each) of

ANTHRACITE STEAMER COAL,

all under deck, which I promise to deliver in the like good order at the port of Port Royal, S. C., (the damages of the seas only excepted,) unto Lieut S. S. Gregory, act'g ass't quartermaster, or to his assigns; freight for the same payable by the U. S. quartermaster at Philadelphia, to the order of John H. Kimball, at the rate of six $\frac{25}{100}$ dollars per ton, and demurrage one hundred dollars per day, allowing twenty-one (21) days for discharging.

"In witness whereof, the master of the said vessel

If, on the arrival of this vessel at the port of destination, the consignee should order her to another place of discharge, such order in all cases to be in writing on the bill of lading.

Freight and demurrage payable only on certificate of quartermaster that the cargo has been received in good order.

hath affirmed to six bills of lading, all of this tenor and date; one of which being accomplished, the others to stand void.

(Signed) "D. M. HUMPHREYS."

Indorsed on the face as follows:

"The United States Government assumes the war risk on the passage of this vessel out to Port Royal, S. C., and till discharged, the valuation being thirty-six thousand dollars. ($36,000.)

(Signed) "HENRY BOWMAN,
"*Capt. and Ass't Quartermaster*"

Indorsed on the back as follows:

"Arrived at Hilton Head, S. C., May 4th, 1865, at 3 o'clock, p. m.

(Signed) "JOHN L. KELLY,
"*Captain and A. Q. M.*"

"Discharged at Hilton Head, S. C., June 24th, 1865, at 11 o'clock, p. m. Cargo received in good order, as per within bill of lading. The detention of the vessel was owing to no fault of the master or crew.

(Signed) JOHN L. KELLY,
"*Capt. and Ass't Quartermaster.*"

The court below finds that the barque arrived at Port Royal with the cargo specified in the bill of lading on the 4th of May, 1865, and immediately tendered her freight to the consignee, Captain Kelly, assistant quartermaster there. The quartermaster, on the 6th of May, refused to receive the same, and ordered the master of the barque to proceed with it to Key West, and report to the quartermaster at that port, which additional service the master refused to perform, and notified the quartermaster that the owners would hold the Govern-

ment liable for all damages if such service was enforced. On the 8th of May, the master was compelled to undertake the additional voyage, and was notified by the quartermaster that in case of refusal he would be taken from the vessel and another master be substituted, and sent in command of the vessel. The master then protested at being compelled to sail at the time specified by the quartermaster, for the reason that it was not safe, as the tide had ebbed about two hours, and there would not be water enough on the bar to take the vessel safely over. The delay requested was refused. The vessel was taken in tow by a Government tug, and struck violently on the bar off Port Royal by reason of the low water, it being near the ebb, and sprang a leak. Being severely injured, she was towed back and stranded, to prevent her foundering.

The court further finds that, after the injury to the vessel, she was detained by the defendant's delay in discharging her freight at Port Royal until the 24th of June, 1865, the detention being owing to no fault of the master or crew.

It further finds that the vessel was then further detained at Port Royal by her injuries, received as aforesaid, and by the necessity of having a tow and steam pump in her disabled condition, from and including the 25th of June until the 11th of July. She was then towed by the Government to Boston, where she arrived on the 18th of July, when her crew was discharged.

The court finds, the damages suffered by the owners

for the loss of the services of the vessel, and her expenses, in the sum of $100 per day, making the sum $5,300.

The court finds,also, that the claimants paid for the repairs of the barque, at Boston, the sum of $7,604 41, and this amount was expended strictly in making good the vessel's injuries.

It further finds, that the Government has paid to the owners the amount due under and by the terms of the contract for the freight, but they have refused to pay the demurrage up to the 24th of June, caused by their delay in discharging the cargo, and the further demurrage caused by their impressment of the vessel up to the 18th of July, 1865, when she arrived at Boston, and they have also refused to pay the said amount paid and expended in the necessary repairs of the vessel.

The court likewise finds, that the marginal note, affixed to the bill of lading was a printed direction, placed there by the Quartermaster's Department, intended for the convenience of the department, and as a direction to the officers thereof.

In the additional facts, the court further finds, that the claimants presented the bill of lading to the proper officers of the Treasury Department with proofs of the various facts set forth in the findings, and with a demand specifically stated for the payment of their expenses in making good the vessel's injuries. The officers of the department refused to allow any amount whatever to the claimants, except for the freight of the cargo. Upon

these facts, the court held that they constituted sufficient evidence to sustain the ultimate fact set forth in the seventh finding, that the defendants have refused to pay the demurrage claimed.

Upon these facts, the court decides, as conclusions of law—

"I. That the bill of lading on which the action is brought constituted a valid contract of affreightment for the transportation of goods and merchandise from Philadelphia to Port Royal, and that the marginal note thereon, expressing no consideration for further services, imposed no obligation upon the owners to transport the goods to any other port, except with their consent, and upon a rate to be agreed upon.

"II. That for the demurrage caused by the defendants in not discharging their freight within twenty-one days after the vessel's arrival at Port Royal, that is to say, by the 25th of May, the claimants should recover demurrage until the freight was discharged, on the 24th of June, at the rate agreed upon in the bill of lading, to wit., $100 per day.

"III. That the enforced service of the vessel, while remaining in the possession of her master and crew, set forth in the third finding, was not an appropriation of the claimants' property by the army of the United States, within the meaning of the act of July 4, 1864, (13 Statutes at Large, p. 381,) but that it was an impressment of their vessel and crew's service within the meaning of the acts March 3, 1849, and March 3, 1863, (9

Statutes at Large, 414; 12, *ib.*, p. 743,) and of the joint resolution of December 23, 1869: and that the claimants are entitled to recover the value of their vessel's services and expenses from the 25th of June to the 18th July, 1865, and their costs and expenditures in repairing, making whole her injuries, to wit., the sum of $12,904 41."

The United States appeals and assigns as errors—

First. That the court erred in deciding that the memorandum in the margin was no part of the contract.

Second. In not deciding that it was the duty of the master, when ordered to proceed to Key West, to do so; and that any injury which the barque received was a peril of the sea, for which the Government was not responsible.

Third. In deciding that any suit can be maintained in the Court of Claims for any injury to the owners resulting from the action of Captain Kelly in ordering the vessel to sail to sea on the 8th of May.

Fourth In deciding that after the failure to deliver the cargo, as directed at Key West, the owners were entitled to any demurrage up to the 24th of June, or after that time until her arrival in Boston.

ARGUMENT.

I.

The bill of lading and the memorandum on its margin must be construed together. The marginal clause was not merely a direction to the Government

officers at Port Royal, but, like the memorandum or marginal clause in a policy of insurance, was a part of the contract entered into between the parties, and by it the master was required to proceed to Key West, when directed so to do by the quartermaster at Port Royal. (See Barnard *vs.* Cushing, 4 Met., 230.)

II.

If this be so, then it is evident that the delay in getting away from Port Royal for Key West was owing to the fault of the master. But, however this might be, the stranding of the barque when going over the bar was a peril of the sea, and the consequent injury is one which must be borne by the owners of the vessel, and not by the Government. (Reed *vs.* United States, 11 Wallace, 591.)

III.

But if the contract of affreightment did not require the master to proceed, when ordered, from Port Royal to Key West, and there discharge his cargo, it follows, either that the action of the Government officers in requiring this duty of him was tortious, in which case no action can be maintained against the Government in the Court of Claims for the consequence thereof; or else it was an appropriation of the vessel for the military service of the Government, within the meaning of the act of July 4, 1864, (13 Statutes at Large, 381,) and, therefore, is a case expressly taken out of the jurisdic-

tion of the Court of Claims thereby. (See brief in U. S. *vs.* Russell.) In neither case can the consequences of ordering the vessel to sea be considered as damages arising from a breach of contract by the Government.

IV.

If the Government were liable to pay any demurrage at all, it was only from the 25th of May until the 24th of June, because then the vessel was discharged of her freight, and her further detention at Port Royal and her passage to Boston were rendered necessary by injuries for which counsel contend the Government are not responsible in this action. But no demand was made upon the Government for any demurrage whatever. That is a separate and distinct item, and not one which is included within a demand for the expenses incurred in repairing the vessel. No demand, therefore, having been made upon the officers of the Treasury, the suit therefor was prematurely brought. (Clyde's case, 5 Court of Claims, 134.)

The decision of the Court of Claims upon the meaning of its own rules is not conclusive, nor can they be dispensed with in particular cases. (Thompson *vs.* Hatch, 3 Pick., 512.)

B. H. BRISTOW,
Solicitor General.
C. H. HILL,
Assistant Attorney General.

Supreme Court of the United States.

THE UNITED STATES, APPELLANTS,

vs.

JOHN H. KIMBALL ET AL.

No. 234.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF COUNSEL OF APPELLEES.

N. P. CHIPMAN,
CHARLES F. PECK,
THOMAS J. DURANT,
Counsel for Appellees.

Supreme Court of the United States.

THE UNITED STATES, APPELLANTS,

vs.

JOHN H. KIMBALL ET AL.

No. 234.

APPEAL FROM THE COURT OF CLAIMS.

Brief of Counsel of Appellees.

The petitioners brought their action against the United States to recover $7,005 42 for damage done to their bark, Annie Kimball, while in the Government employ. See Pet. Rec. pp. 1 and 2.

By a supplemental petition a further claim was made of $5,600, for loss of time of the bark, caused by demurrage during the fifty-six days, at one hundred dollars a day. See Rec. pp. 3 and 4.

By a further supplemental petition the amount stated in the original petition was corrected so as to be $7,604 61. See Rec. p. 5.

This made the claim in the aggregate amount to $13,204 61.

The court below gave judgment for $12,904 41, (See Rec. p. 5,) and the United States have appealed.

THE FACTS OF THE CASE.

It will appear by reference to the findings of fact made by the lower court: (Rec. p. 6.)

That on April 18, 1865, the quartermaster's department

shipped on the petitioners' bark, Annie Kimball, a cargo of coal to be transported from Philadelphia, Pa. to Port Royal in South Carolina, for which the master of the bark, Humphreys, signed a bill of lading, contracting to deliver the coal at Port Royal to Quartermaster Gregory there, for the price of freight at $6 25 per ton; stipulating for demurrage at $100 a day after twenty-one days allowed for discharging. See Rec. p. 2.

That the vessel arrived at Hilton Head (Port Royal), S. C., on May 4th, 1865, at 3 p. m., and immediately tendered the freight to the consignee there. Rec. p. 6, lines 32 to 35.

The consignee at Port Royal, the quartermaster, refused to receive the freight; he ordered the master of the bark to proceed to Key West and report to the quartermaster there, which the master refused to do, and notified the quartermaster he would hold him for damages if such service was enforced. Rec. p. 6, lines 35 to 40, and letter of master of bark on Rec. p. 8.

On May 8, the quartermaster proceeded to compel the master of the bark to go to Key West, notifying him that if he continued to refuse he would be taken out of the vessel and another man put in charge. Rec. 6, lines 40 to 44.

The master of the bark then protested at being compelled to go at that time, as the tide had ebbed and there was not water enough on the bar. Rec. p. 6. at foot.

The quartermaster would not wait and had the bark taken in tow by a United States tug boat, in consequence of which she struck violently on the bar, where there was not enough water, sprung a leak, was severely injured, towed back and run upon the beach to save her from foundering. Rec. p. 7 to p.

The bark after this was detained, without any fault of the master or crew, but on account of the defendants not discharging her until June 24. Rec. p. 7, lines 5 to 7.

And was further detained from that time until July 11 inclusive, by reason of her injuries and by the necessity of having a steam pump and a tow boat in her disabled condition. Rec. p. 7, lines 8 to 11.

The bark was then towed to Boston by the agents of the Government, arriving there on July 18, 1865. The damages suffered by petitioner by the loss of the vessel's service and her expenses, was $100 a day, in all $5,300. Rec. p. 7, lines 11 to 15.

The cost of strictly necessary repairs in Boston, caused by her injuries alone, was $7,604 41 which was paid by petitioner. Rec. p. 7, lines 16 to 18.

The United States Government has paid petitioner the freight due under the bill of lading, but has refused to pay:

1st. Demurrage up to June 24, caused by delay of the Government in discharging the cargo.

2d. Further demurrage up to July 18, caused by the Government impressing the vessel and injuring her.

3d. The necessary repairs of the vessel.

On the above facts the court below gave judgment in favor of petitioner in the sum of $12,904 41 (see Rec. p. 5, foot); and the Government has appealed.

The counsel of plaintiff and appellee submit the following points:

First. The cargo mentioned in the bill of lading, having been delivered and the freight thereon paid, the first question arising is on the liability of the defendants for demurrage.

The bill of lading (see Rec. p. 2) binds the defendant to discharge the cargo of the bark in 21 days after arrival, and to pay 100 dollars a day in case of detention beyond that time. That the bark was detained beyond that time is not disputed; and the defendants cannot say that it was the fault of petitioner, because he refused on arrival at Port Royal to go thence to Key West, as defendant says he was bound to do by virtue of the printed memorandum

n the margin of the bill of lading, since the fact is found that the detention was not the fault of the master or crew of the bark. Rec. p. 7, line 7.

This memorandum is made and as well as the bill of lading furnished by the defendants, and was designed for their benefit, to the end that in case a new contract should be entered into, the same should appear in writing, and thus leave no doubt as to its nature and extent.

The contract in the bill of lading was a purely voluntary one on the part of the petitioner, so in case he should be called upon to perform further service, it was contemplated by the memorandum such service should be voluntary also, and the contract made apparent in the same way.

But when the bark arrived at Port Royal the petitioner was unwilling to perform the further service required of him by the consignee there.

Having then performed her voyage; having offered to deliver her cargo; the 21 lay days having expired, and there having been a demurrage (*demorari*, to keep back, to hinder,) of 30 days, before the bark was discharged of her cargo, this demurrage is the very case put in the bill of lading for which it is agreed $100 a day should be paid; hence there is due for that cause $3000.

Second. The Government is legally liable for the damages caused by the injury the bark sustained when the attempt was made to tow her over the bar at Port Royal.

This damage is resolved into two items:

1. The time and expenses of the bark from June 25 to July 18, occupied in taking her from Port Royal to Boston, twenty-three days, found as a fact (see Rec. p. 7, line 14) to be $100 a day, and so equal to $2300.

2. The cost of repairs in Boston rendered necessary by the injury sustained in the attempt to cross the bar, $7604 41.

The military officer of the United States at Port Royal believed, no doubt in good faith, that the master of the bark was bound by the bill of lading to take the coal to Key West, and being in this mind, on the master's refusal, proceeded to compel him by force to perform what he conceived to be his duty. This military officer, it may be taken for granted, considered there was a military necessity for the coal to be taken to Key West.

At this point let us place the alternative propositions; one maintained by the plaintiff, the other by the defendant; the latter says the master of the bark was bound by his contract to take the coal from Port Royal to Key West; the former says the master was not so bound.

If the master was bound by the contract to proceed to Key West, still he was in command of the bark and responsible to his owners and the underwriters, for the skill and prudence of his management; and for want of either, his owners would lose their claim on the underwriters for any loss that might ensue therefrom. When ordered to go out of the harbor of Port Royal, the master of the bark declared that the wind and tide was in such a condition as rendered it imprudent to do so at that time; and he asked for delay. The military officer refused to wait and forced him to go out then and there. The disaster the captain of the bark had foreseen then took place, and under the circumstances neither he nor his owner are responsible for it.

But suppose the master of the bark was not bound by his contract to take coal to Key West; and the military officer is then to be regarded as impressing the vessel for an emergency requiring such action, then—setting aside the manifest impropriety of running the vessel into danger by going out of port at an improper ttme—whatever damage occured in the execution of the task thus imposed, is immediately attributable to the act of force employed.

Thus in both cases presented by the alternative propositions, the loss has resulted from an act of military force rendered necessary by the exercise of a discretion vested in the officer at Port Royal; a discretion vested in him as being charged with the conduct of military movements performing a duty necessary to the furtherence of the operations of the war in which the Government was engaged, and unavoidably involving risks to property and life which the war itself gave rise to. Such risks the Government undertook, by their contract with the petitioner, to insure. See the stipulation written on the face of the bill of lading. Record, p. 2, at foot.

Had a private underwriter taken the risk, he would clearly be liable for such an act of the Government.

See Arnold on Insurance, p. 779 *et seq*.

Aside from the fact that the loss occurred by a "war risk," it may be further inquired whether the act of the military officer at Port Royal, in taking possession of the bark for the purposes he had in view, was "an appropriation" or "an impressment." In either case it may be said his act was a legal one; he was placed in a position where he had to act on his own judgment as to the necessities it imposed upon him. The consequences, however, in either case, differ as to the remedy, as is contended by the Attorney General, who denies that the Court of Claims had jurisdiction if the act were one of "appropriation," as he contends it was, though the court undoubtedly had jurisdiction if it was an impressment.

As by amendment V, Constitution United States, private property may not be taken for public use, without compensation, so soon as property is taken for such use, the obligation to pay for it arises; when taken without an agreement with the owner as to the price, the implied obligation to pay a just price originates. On such implied contract, suit might have been brought against the United States, under the Acts of February 24, 1855, Sec. 1,

X Stat. at Large, p. 612, and Act of March 3, 1853, Sec. 2. XII Stat. at Large, p. 765.

That jurisdiction, however, was taken away by act of July 4, 1864, Sec. 1, XIII Stat. at Large, p. 381, which declared "that the jurisdiction of the Court of Claims shall not extend to or include any claim against the United States, growing out of the destruction "*or appropriation*," of, or damage to property by the army or navy, or any part of the army or navy engaged in the suppression of the rebellion from the commencement to the close thereof."

After this came the Act of February 9, 19 or 21, 1867, XIV Stat. at Large, p. 397, which declared that the provisions of the act of July 4, 1864, just quoted, should not apply to cases where the "claim originated during the war for the suppression of the southern rebellion in a State or part of a State, declared in insurrection by the President of the United States, dated July 1, 1862, or in a State which, by an ordinance of secession, attempted to withdraw from the United States Government."

But this language was found to be too broad, as it embraced the property situated in an insurrectionary State, but belonging to a loyal citizen residing in a loyal State, the property having been lawfully conveyed to the State in insurrection.

To remedy this mischief, Congress adopted the joint resolution of December 23, 1869, XV Stat. at Large, p. 368, which declares "that the act of February 19, 1867, shall not apply to nor be construed to debar the settlement of claims for steamboats or other vessels taken without consent of the owner, or impressed into the military service of the United States, during the late war; *provided*, that the claimants were loyal at the time their claims originated, and remained loyal thereafter, and were residents of loyal States, and steamboats or other vessels were in the insurrectionary districts by proper authority, viz:

charter, contract, impressment or in conformity with the rules and regulations established by the Secretary of the Treasury and approved by the President of the United States."

It has been considered by persons, competent to form an opinion, that this joint resolution restored the jurisdic- of the Court of Claims in a case like the present which comes fully within the terms of the proviso; and in support of this view we submit that as the acts of Febr'y 19, 1867, and July 4, 1864, are referred to in general terms by the joint resolution of December 23, 1869, the latter embraces the whole of the former; now the first section of the act of July 4, 1864, prohibited the Court of Claims from settling by judgment the whole of a certain class of claims, while the joint resolution declares said act shall not debar the settlement of certain individual claims of that class; and this claim is one of those individuals; therefore the Court of Claims is not debarred from settling it.

This court said in Filor's case, 9 Wallace, 49:

"The term appropriation is of the broadest import; it includes all taking and use of property by the army or navy, in the course of the war, not authorized by contract with the Government. The use may be permanent or temporary, and it may result in the destruction of or mere injury to the property. If the right to the property or to its use, is not obtained by valid contract with the Government, the taking or use of it is an appropriation within the meaning of the act of Congress."

This definition however could not have been designed to declare "impressment" and "appropriation" to be synonymous terms. They are not so by their derivation; they are not so by popular use. The acts of Congress make use of both words, and have certainly designed they should not be confounded. A man may be impressed but he cannot be appropriated: a horse may be both: so may a steamboat or other vessel. Circumstances must determine the

character of the act, which rests in some cases on the intent with which it is commenced; in some cases, on what occurs afterward. Were a man impressed, the intention to appropriate could not be presumed, because of its impossibility; were a ship impressed, appropriation cannot be presumed, because of the doubt whether it will be temporarily or permanently needed; whichever of these two qualities exist will determine the character of the act; if only a temporary purpose is to be served and the property then restored to its owner, the act is only an impressment; but if it be designed to consume or not restore the property, it is an appropriation.

See Reed *vs.* U. S., 11 Wallace, p. 601.

The term "appropriation," it may be further said, naturally refers to the taking of property, in the sense of taking it out of the possession of the owner, and taking it into the possession of the Government, thereby divesting the owner of his title, if not of his right.

Impressment, on the other hand, naturally refers to a compelling of the performance of services without acquiring any property in the instrument used in performing the service.

Here there was no attempt to acquire any property in the vessel or to take her out of the possession of the owner or master, but a specific service was pointed out, which the vessel was compelled to undertake.

If then the case should not be clear that the jurisdiction of the Court of Claims has been restored by the joint resolution of 1867, even in case of an "*appropriation*" of a vessel situated as the petitioners' was; yet as this was merely a case of impressment the jurisdiction exists and has never been taken away.

The third section of the act of March 3, 1849, IX Stat. at L. p. 415, as amended by the fifth section of the act of March 3, 1863, XII Stat. at L. p. 743, makes the loss sustained by petitioner in the damage done to his vessel, a

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valid claim against the United States, and under the eighth section of the act of July 28, 1866, XIV Stat. at L. p. 327, amending the fourth section of the act of March 3, 1849, IX Stat. at L. p. 415, leaves such claim to be settled as all other claims are in cases of contracts, express or implied with the Government, and for all such, the claimant may apply either to the proper department or to the Court of Claims.

Hence, in any view which may be taken of the act of the officer at Port Royal, the Court of Claims has jurisdiction of petitioners' claim.

It must here be remarked, however, that our case does not rest exclusively on the consideration of express and implied contract, so far as the question of jurisdiction of the Court of Claims is involved, and as it has been mainly discussed in the foregoing remarks, but has other supports equally if not still more solid.

The Court of Claims is, by acts of its organization, specially vested with jurisdiction of this case under that clause which says, "and the said court shall hear and determine all claims founded upon any law of Congress."

See Sec. 1, Act of 24 Feb., 1855, 10 Stat. at Large, p. 612.

Sec. 2, Act of March 23, 1863, 12 Stat. at Large, p. 765.

Now the petitioners' claim comes precisely within the category defined by this language; it is a claim founded on a law of Congress; on that law we have quoted, which declares that "any person who has lost, or shall lose, or has had, or shall have, destroyed by unavoidable accident"—"any boat, steamboat or other vessel"—"while such property was in the service aforesaid" of the United States, shall be allowed, and paid the value thereof, at the time he "——it——" entered the service.

See Sec. 2 of Act of March 3, 1849, 9 Stat. at Large p. 415, as amended by—

Sec. 5 of Act of March 3, 1863, 12 Stat. at Large, p. 743.

The petitioners' claim is covered completely by the expression of these acts of Congress.

His vessel was in the service of the United States, and while so serving, was seriously damaged by an event which has entailed a large pecuniary loss on the petitioner, and which occurred without any fault or negligence on his part or on that of any one in his employ.

The view taken by the Attorney General in his brief, we understand to be that the act of Congress is only applicable to cases where there is an entire destruction of the property, and that when only parts of it are destroyed no relief can be had, but this would be contrary to the well settled rules of intrepretation, as well as against the uniform and undeviating practice of the Government.

Having, as we believe, clearly demonstrated the jurisdiction of the Court of Claims to hear and determine this cause, and on grounds independent of the questions of the loss having been a "war risk," undertaken by the Government, as we have contended above; we proceed further:

The military officer at Port Royal was acting in the direct line of his agency, and the law is clear in such cases; the principal is responsible for the agent's acts. This is admitted by the Attorney General's brief, p. 5, by implication, since he avoids it by saying the loss was a marine risk, which he says the United States were not liable for. This, however, was not a marine risk, properly speaking, any more than drowning the captain would have been, by holding him under water. The military officer, in the discharge of his duty, lays hold of the vessel, and acting on his own judgment and against the advice of an expert, exposes her to damage, his act was therefore the proximate cause of the loss, and being an act within

the scope of his authority, the liability of the principal is a legal consequence.

Respectfully submitted,

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October 12, 1871.